No. 83-258

In the Supreme Court of the United States

OCTOBER TERM, 1983

SIGMUND DIAMOND, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner seeks review of the court of appeals' holding that the affidavit of an FBI agent assigned to the Bureau's Freedom of Information Office is sufficient to establish an implied assurance of confidentiality needed to withhold documents under Exemption 7(D) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(D).

1. Petitioner, a university professor, requested disclosure of documents concerning government surveillance during the 1950s of himself and other academics.[1] The government released 638 unredacted pages of documents and 382 redacted pages; it withheld 118 pages. Petitioner brought

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[1]Petitioner relied upon both the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a. His arguments are now limited to the FOIA.

suit in the United States District Court for the Southern District of New York to obtain disclosure of the withheld information. Pet. App. A11-A12.

The district court granted summary judgment for respondents, concluding that the withholding of information was proper under FOIA exemptions (Pet. App. A39). The only exemption pertinent to this petition is Exemption 7(D), which authorizes an agency to withhold law enforcement investigatory records if production of the records would

> disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, * * * confidential information furnished only by the confidential source.

Pursuant to this exemption, respondents deleted the names of persons who gave information under express or implied promises of confidentiality, as well as information that had been furnished by such persons and might tend to identify them (Pet. App. A30). The district court required respondents "to submit a supplemental affidavit describing in further detail the context in which the information was received and whether the nature of the Bureau's investigation was revealed to the interviewee, to the extent that such information can be found in the Bureau's files and records" (*id.* at A35). After the supplemental affidavit was submitted, the district court, in an endorsement dated January 26, 1982 (*id.* at A42-A44), upheld respondents' invocation of Exemption 7(D). The court held (*id.* at A43):

> The supplementary affidavit appropriately supplies the reasonable basis for the government's action absent from the original affidavit since King [the FBI agent submitting the supplemental affidavit] indicates that the interviewee either asked that his identity not be

> revealed, or knew he was speaking to F.B.I. agents under circumstances where it would be expected that his identity would not be revealed. Accordingly, the court is satisfied with the government's explanation and find[s] reliance on the (b)(7)(D) exemption appropriate.

The court of appeals (Pet. App. A1-A9) affirmed the district court's judgment "substantially for the reasons stated in Judge Carter's careful and comprehensive opinion * * * and the memorandum endorsement" (*id.* at A3). The court of appeals held (*id.* at A7-A8) that petitioner's reliance on *Londrigan* v. *FBI (Londrigan I)*, 670 F.2d 1164 (D.C. Cir. 1981), was mistaken, since that case concerned Exemption (k)(5) of the Privacy Act of 1974, 5 U.S.C. 552a(k)(5),[2] rather than Exemption 7(D) of the FOIA. In *Londrigan I*, a former applicant for federal employment made a Privacy Act request for information received in the course of a background investigation concerning his suitability for federal employment. The court held that the affidavit of an FBI supervisor was insufficient to establish that the information had been obtained pursuant to promises of confidentiality. The court stated (670 F.2d at 1173): "Something more is necessary than a general averment that all information complied by the agency prior to 1975 was acquired pursuant to implied pledges of [confidentiality]." However, as the court below noted (Pet. App. A7), the

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[2]Exemption (k)(5) of the Privacy Act applies to

> investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence[.]

Londrigan I court made clear that "its analysis was unique to the purposes and scope of the Privacy Act, and would not apply to criminal law enforcement documents." See 670 F.2d at 1170. Accordingly, the court below concluded that *Londrigan I* did not require that respondents present an affidavit based on personal knowledge in order to withhold under Exemption 7(D) of the FOIA information relating to the identities of confidential sources in law enforcement investigatory records. Rather, the court concluded (Pet. App. A7-A8):

> In light of the practical difficulty—if not impossibility—of justifying each use of the confidential source exemption by way of an affidavit on personal knowledge, the district court properly applied the "functional approach," *Lamont* v. *Department of Justice, supra,* 475 F. Supp. [761,] 779 & n.74 [(S.D.N.Y. 1979)] (collecting cases), denying disclosure of the names of interviewees and others where "it is apparent that the agency's 'investigatory function depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known,' " *id.* at 779 (citation omitted).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review.

Exemption 7(D) of the FOIA authorizes nondisclosure of "[i]nvestigatory records compiled for law enforcement purposes" if production would disclose "the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, * * * confidential information furnished only by the confidential source." Here, there is no doubt that the records at issue were "compiled for law enforcement purposes." It also is clear that the persons interviewed by the FBI were "confidential" sources, *i.e.*,

persons who "provided information under an express assurance of confidentiality or in circumstances from which such assurances could be reasonably inferred." S. Rep. 93-1200, 93d Cong., 2d Sess. 7 (1974). The government submitted a detailed affidavit showing that each source interviewed by the FBI "either asked that his identity not be revealed, or knew he was speaking to F.B.I. agents under circumstances where it would be expected that his identity would not be revealed" (Pet. App. A43). This showing was as much as can reasonably be demanded in cases like this, involving interviews conducted long before the Freedom of Information Act was enacted. In such cases, requiring the submission of an affidavit based on personal knowledge, as petitioner requests (Pet. 6, 9-10), would render Exemption 7(D) essentially useless.

The government's showing in this case went beyond what other courts of appeals have required to justify nondisclosure under Exemption 7(D) of the FOIA. The Seventh Circuit has held that "[u]nless there is evidence to the contrary in the record, * * * promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation." *Miller* v. *Bell*, 661 F.2d 623, 627 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982). The Sixth Circuit has followed this approach. *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983). See also, *e.g.*, *LaRouche* v. *Kelley*, 522 F. Supp. 425, 439 (S.D.N.Y. 1981); *Ramo* v. *Department of Navy*, 487 F. Supp. 127, 130, 133 (N.D. Cal. 1979); *Pacheco* v. *FBI*, 470 F. Supp. 1091, 1101-1104 (D.P.R. 1979).

These decisions find clear support in the legislative history. The joint explanatory statement of the House and Senate conferees regarding the 1974 FOIA amendments stated (S. Rep. 93-1200, 93d Cong., 2d Sess. 13 (1974)):

> [I]n every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information.

Similarly, Senator Hart, the author of the 1974 amendments, stated (120 Cong. Rec. 36871 (1974)): "[A]ll the F.B.I. has to do is state that the information was provided by a confidential source and it is exempt." [3]

For the reasons explained by the court of appeals, the decision in this case does not conflict with *Londrigan I*, in which the court stated (670 F.2d at 1170) that "its analysis was unique to the purposes and scope of the Privacy Act, and would not apply to criminal law enforcement documents" (Pet. App. A7). Indeed, the *Londrigan I* court expressly noted that "Exemption (k)(5) of the Privacy Act must be carefully distinguished from Exemption 7 of FOIA * * *" (670 F.2d at 1170 n.34). In light of these statements, *Londrigan I* offers no support for petitioner's position.[4]

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[3]Petitioner's objection (Pet. 6, 9-10) that summary judgment was improper is not well taken. Because the unrebutted affidavit of Agent King amply satisfied the requirement for nondisclosure, a trial was unnecessary.

[4]Moreover, there is no reason why the showing required under Exemption (k)(5) of the Privacy Act and Exemption 7(D) of the FOIA should be the same. While the two provisions are similar in some respects, Exemption 7(D) applies only to "investigatory records compiled *for law enforcement purposes*" (emphasis added) whereas Exemption (k)(5) of the Privacy Act applies broadly to "investigatory materials compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information." In addition, the disclosure provisions of the Privacy Act apply only to an individual's own records, whereas the FOIA concerns public disclosure. These differences provide a basis for requiring a lesser showing under Exemption 7(D) of the FOIA.

Furthermore, in *Londrigan* v. *FBI*, No. 83-1101 (Dec. 13, 1983), the District of Columbia Circuit held that even under Exemption (k)(5) of the Privacy Act it is not necessary to demonstrate that each interviewee "expected and understood that his or her identity would be shielded" (slip op. 7). Instead, the court held that affidavits establishing the FBI's policies and the practices of some of the interviewing agents sufficed. This showing, the court stated (slip op. 2), "was all a court could reasonably demand."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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